IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5060 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHARMENDRA TEXTILE PROCESSORS

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 5060 of 2004

MR PARESH M DAVE for Petitioner No. 1-2

MR JITENDRA MALKAN for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2-4

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 31/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Mr JM Malkan, learned Senior Standing Counsel for the Central Government waives service of Rule for the respondents.

At the request of the learned Counsel appearing for the parties the matter is taken up for final disposal today.

1A. By our order dated 19.7.2004, we had required the petitioners to segregate the challenges contained in this petition and to confine this petition to the challenge to the Stay Order NO.118/2004-B dated 18.3.2004 in Appeal No.E/3747/2003.NB(B) in which subsequently, the challenge to the order dated 30.10.2000 (Annexure "G") also came to be added. The challenge to the Stay Order No.117/2004-B dated 18.3.2004 in Appeal No.E/3746/2003-NB(B) is now the subject matter of another petition being Special Civil Application No.8840 of 2004.

2. What is challenged in this petition under Article 226 of the Constitution is order the dated 18/3/2004 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi requiring the petitioners to make pre-deposit of Rs.5 lakhs and waiver of the remaining amount of duty and penalty aggregating to Rs.15 lakhs. The appeal before the Tribunal arises from Order-in-appeal No.465/03 dated 18/8/2003 passed by the Commissioner of Central Excise (Appeals), Ahmedabad dismissing the appeal on the ground of non compliance with the pre-deposit order dated 31/3/2003 directing the petitioners to deposit Rs.5 lakhs.

3. The aforesaid appeal before the Commissioner (Appeals) was directed against order dated 10/09/2001 (Annexure 'H' to the petition) passed by the Additional Commissioner of Central Excise, Ahmedabad -1, based on the Commissioner's order dated 30/10/2000 (Annexure "G" to the petition) rejecting the petitioners' claim for abatement for the period from 1/3/2000 to 31/3/2000 on the ground that the petitioners' factory was not completely closed during the said period.

4. By draft amendment dated 10.8.2004 which was served upon the learned Senior Standing Counsel for the Central Government on 12.8.2004, the petitioners have also challenged the decision contained in the communication dated 30.10.2000 (Annexure "G") on the ground that the said decision was taken in violation of the principles of natural justice as the petitioners were not given any notice nor were the petitioners afforded any opportunity of hearing before the said decision was

taken. If the Commissioner had invited objections and heard the petitioners before taking the aforesaid decision, the petitioners would have pointed out the legal position as explained by the Board vide Circular dated 15.9.1999 and the petitioners would also have pointed out various documents at Annexure "M Colly.". It is, therefore, submitted by Mr Dave at the hearing of the petition that if the said aspect had been taken into consideration, the Tribunal would have granted unconditional stay of recovery without requiring the petitioners to deposit the pre-deposit amount as condition of hearing the appeal.

5. On the other hand, Mr Malkan, learned Senior Standing Counsel for the Central Government has opposed the petition and submitted that in the first place the petitioners did not comply with the order passed by the Commissioner (Appeals) requiring the petitioners to make pre-deposit of Rs.5 lakhs against the confirmed duty amount of Rs.10 lakhs plus penalty of Rs.10 lakhs and, therefore, the petitioners have failed to comply with similar condition imposed by the Tribunal also. In the facts and circumstances of the case, no interference of this Court is called for.

As regards challenge to the order dated 30.10.2000 (Annexure "G"), Mr Malkan has invited our attention to paragraph 8 of the affidavit-in-reply wherein reference is made to the petitioners' letter dated 22.3.2000 to the effect that the petitioners were not interested in sealing of their boiler at that point of time. It is, therefore, submitted that the petitioners did not follow the procedure laid down and, therefore, the abatement claim was rightly rejected.

6. Having heard the learned counsel for the parties, we are of the view that in this petition under Article 226 of the Constitution we are not required to entertain challenge to the order dated 30.10.2000 (Annexure "G") on merits because the challenge involves disputed questions of fact. However, the petitioners' contention that the said order dated 30.10.2000 was passed without issuing any notice to the petitioners or without giving the petitioners any opportunity of hearing has not been disputed by the respondents. It is, of course, contended on behalf of the respondents that there is considerable delay in challenging the said order to which Mr Dave for the petitioners submits that challenge to the void order can be made in collateral proceedings pertaining to the same duty demand.

7. In the facts and circumstances of the case and considering the fact that the order dated 30.10.2000 was passed without issuing notice to the petitioners or without affording any opportunity of hearing to the petitioners and the said order was not appealable, but has been made the foundation for passing subsequent orders for fastening duty liability on the petitioners, we are of the view that in the facts and circumstances of the case, the challenge to the said order dated 30.10.2000 deserves to be entertained, more particularly, because the petitioners had never acquiesced into the said duty liability and the petitioners have been contesting the proceedings all throughout. Hence, it cannot be said that the petitioners had abandoned their right to contest the levy of duty for the month of March 2000. In this set of circumstances, we entertain challenge to the order dated 30.10.2000 (Annexure "G") and hold that the order is required to be set aside on the ground that the order was passed in violation of the principles of natural justice and the Commissioner of Central Excise, Ahmedabad is required to decide the petitioners' claim for abatement for the month of March 2000 afresh after giving the petitioners an opportunity of being heard.

8. Since the order dated 10.9.2001 (Annexure "H") was passed by the Additional Commissioner of Central Excise, Ahmedabad-1 on the basis of the aforesaid order dated 30.10.2000 (though para 8 of the order Annexure "H" refers to the same as order dated 30.12.2000 bearing No.IV/16-362/MP/98-P), in our view, the said order in original dated 10.9.2001 (Annexure "H") and the subsequent order in appeal passed by the Commissioner (Appeals-I), Central Excise, Ahmedabad (Annexure "I") will not survive and, therefore, the stay order dated 18.3.2004 passed by the Tribunal will also not survive. In fact the appeal before the Tribunal will also become infructuous. Mr Dave for the petitioners, therefore, states that the petitioners shall withdraw the aforesaid appeal pending before the Tribunal.

9. Even while setting aside the abatement order dated 30.10.2000 (Annexure "G") we find that since the subsequent proceedings arose on account of the inaction on the part of the petitioners in not challenging the said order dated 30.10.2000 (Annexure "G") in time before this Court (though the petitioner-Company had continued to contest its liability for the relevant period), the petitioners should be required to pay the costs of Rs.10,000/- to the respondent-authorities and also to deposit a sum of Rs.2,50,000/-, without prejudice to the

petitioners' rights and contentions, which the petitioners may raise before the authorities in the proceedings pertaining to the petitioners' claim for abatement.

10. In the result, we partly allow the petition and quash and set aside the order dated 30.10.2000 (Annexure "G" to the petition), and stay order dated 18.3.2004 of the Tribunal in Appeal No.E/3747/2003, subject to the following conditions:-

(i) The petitioners shall pay the respondent-authorities costs quantified at Rs.10,000/- in one set within one month from today;

(ii) The petitioners shall deposit, without prejudice to their rights and contentions, a sum of Rs.2,50,000/- with the respondent-authorities towards the alleged excise duty liability for the month of March 2000.

(iii) The competent authority shall decide the petitioners' claim for abatement of duty for the month of March 2000 after issuing show cause notice to the petitioners and affording the petitioners an opportunity of being heard and thereafter take appropriate decision regarding the petitioners' duty liability for the said period depending on the outcome of the proceedings for abatement.

11. The petition is accordingly partly allowed. Rule is made absolute to the aforesaid extent only.

12. We may not be treated to have expressed any opinion on the merits of the controversy between the parties.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)
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